

One Hour and Ten Minutes

SESSION III
THE LEGAL ENVIRONMENT

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Upon successfully completing this session, the participant will be able to:

- o State and discuss the elements of DWI offenses.
- o Discuss the provisions of the implied consent law.
- o Discuss the relevance of chemical test evidence.
- o Discuss precedents established through case law.





CONTENT SEGMENTS

LEARNING ACTIVITIES



- | | |
|--|-------------------------------|
| A. Basic DWI Statute: Driving While Under The Influence | o Instructor-Led Presentation |
| B. Implied Consent Law and Presumptions | o Reading Assignments |
| C. Illegal Per Se Statute: Driving With A Proscribed Blood Alcohol Concentration | |
| D. Preliminary Breath Testing | |
| E. Case Law Review | |





Display III-O (Session Objectives)

Aids	Lesson Plan	Instructor Notes
 70 Minutes	III LEGAL ENVIRONMENT	<p>(Time varies with the complexity and variation of your state's laws relating to drinking-driving and DWI enforcement).</p>
 10 Minutes	A. Basic DWI Statute: Driving While Under the Influence	<p>INSTRUCTOR PLEASE NOTE: The lesson plans for this module are based on a generic set of drinking-driving laws, patterned after the <u>Uniform Vehicle Code</u>. Significant modification may be required to adapt this module to the current statutes of your state.</p>
 Display III-1	<ol style="list-style-type: none"> 1. Elements of the offense: it is unlawful for any person to... <ol style="list-style-type: none"> a. operate or be in actual physical control of... b. any vehicle... c. within this state... d. while under the influence of alcohol and/or any drug. 2. In order to arrest someone for a basic DWI violation, officer must have probable cause to believe that all four elements are present. 	<p>Discuss meaning/interpretation of "operational/actual physical control."</p> <p>Discuss meaning of "vehicle".</p> <p>i.e., public or private property anywhere in the state.</p> <p> Ask class: "What does under the influence mean?" Probe for a variety of responses.</p> <p><u>Note:</u> If DWI is not a criminal offense, burden of proof is less than "beyond a reasonable doubt."</p>
HS 178 R2/06	III-1	



Aids	Lesson Plan	Instructor Notes
<div data-bbox="233 1123 300 1188"></div> <div data-bbox="191 1213 354 1245">20 Minutes</div>	<div data-bbox="464 306 951 1104"> <ol style="list-style-type: none"> 3. In order to convict a person of DWI, the arresting officer must establish beyond a reasonable doubt that all four elements were present. 4. In particular, the arresting officer must establish that the accused was "under the influence". <ol style="list-style-type: none"> a. Courts have generally held that "under the influence" means the ability to operate a vehicle has been affected, or impaired. b. To convict a person of DWI, the arresting officer must be able to show that the person's capability of safe operation has been impaired. </div> <div data-bbox="428 1142 902 1209"> <p>B. Implied Consent Law and Presumptions</p> </div> <div data-bbox="464 1285 951 1839"> <ol style="list-style-type: none"> 1. The question of how much impairment constitutes too much impairment is not completely clear. <ol style="list-style-type: none"> a. Some courts have held that impairment of driving to the slightest degree means the person is "under the influence." b. Other courts have insisted on evidence of substantial driving impairment before they will convict someone of DWI. </div>	<div data-bbox="1000 1285 1422 1461"> <p>Emphasize: Participants must be prepared to articulate the impairment exhibited by the defendant at the time of the stop.</p> </div>




Aids	Lesson Plan	Instructor Notes
<div data-bbox="228 453 310 615"></div> <div data-bbox="209 716 375 800"></div> <div data-bbox="191 831 305 894">Display III-2</div>	<div data-bbox="516 306 932 443"> <p>c. The element of "under the influence" thus historically was (and remains) very difficult to prove.</p> </div> <div data-bbox="464 478 943 684"> <p>2. The principal purpose of the Implied Consent Law is to encourage people arrested for DWI to submit to chemical test, to provide scientific evidence of alcohol and/or drug influence.</p> </div> <div data-bbox="464 726 943 1734"> <p>3. Key features/elements of the Implied Consent Law generally include:</p> <ul style="list-style-type: none"> a. Any person who operates a motor vehicle upon the public highways of this state... b. Shall be deemed to have given consent to a chemical test... c. For the purpose of determining the alcohol and/or drug content of that person's blood... d. When arrested for any acts alleged to have been committed while the person was operating or in actual physical control of a vehicle while under the influence of alcohol and/or any drug. <p>4. If a person so arrested refused to submit to the chemical test, no test shall be given.</p> </div>	<div data-bbox="1003 478 1422 548"> <p>Write "Implied Consent Law" on dry-erase board or flipchart.</p> </div> <div data-bbox="1003 863 1377 968"> <p>NOTE: Present here the information relative to your state.</p> </div> <div data-bbox="1003 1178 1425 1247"> <p>NOTE: Some states use breath alcohol concentration (BrAC).</p> </div> <div data-bbox="1003 1633 1409 1839"> <p>Point out that the Implied Consent Law requires the driver to submit to a chemical test(s). The law provides penalties for refusal to submit to the test(s).</p> </div>
HS 178 R2/06	III-3	


Aids	Lesson Plan	Instructor Notes
 <p>Display III-3</p>	<p>a. However, the law provides that the person's driver's license may be suspended or revoked.</p> <p>b. The provision for the license suspension (or revocation) exists to encourage DWI arrestees to submit to the test, so that valuable chemical evidence may be obtained.</p> <p>5. Legal presumptions define the significance of scientific chemical test evidence. They are provided by your state's statutes.</p> <p>a. If test shows blood alcohol concentration is ____ or more: it shall be presumed that the person is under the influence.</p> <p>b. If test shows BAC is ____ or less: it shall be presumed that the person is <u>not</u> under the influence.</p> <p>c. If test shows BAC is more than ____ but less than ____, there is no presumption as to whether the person is or is not under the influence.</p> <p>6. Key Point: As far as establishing that the person was "under the influence" is concerned, The weight of the chemical test evidence is presumptive, not conclusive.</p>	<p>The right to refuse the test is not an <u>unlimited</u> right: the license action is the "price" of the refusal.</p> <p>NOTE: Statutory presumption levels vary from state to state. Know your state law!</p> <p>Insert here:_____ your state statutory levels.</p> <p>NOTE: Specific laws concerning underage drinkers or commercial motor vehicle operators should be addressed here.</p> <p>Point out that, even though there is no presumption of alcohol influence in that range, the test result is still competent, admissible evidence.</p>
 <p>Display III-4</p>		

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III-4

Aids	Lesson Plan	Instructor Notes
 <p data-bbox="191 726 305 789">Display III-5</p>	<ul style="list-style-type: none"> a. If there is no evidence to the contrary, the court may accept the legal presumption, and conclude that the per-son was or was not under the influence on the basis of the chemical test alone. b. However, other evidence (such as testimony concerning observations of the accused's driving, demeanor, appearance, speech, etc.) may be sufficient to overcome the presumptive weight of the chemical test. c. Question number one: is it possible for a person whose blood alcohol concentration was above the per se or presumptive level to be acquitted of DWI? 	<p>Example:</p> <ul style="list-style-type: none"> o chemical test result 0.13; o arresting officer's testimony concerning defendant's driving, appearance, actions, etc., is sketchy or unclear; o defendant and/or other witnesses testify that defendant drove, acted, spoke, etc., in a normal fashion; o result: not guilty.
 <p data-bbox="191 1323 305 1386">Display III-6</p>	<ul style="list-style-type: none"> d. Question number two: is it possible for a person whose blood alcohol concentration was below the per se or presumptive level to be convicted of DWI? e. Summary point: The chemical test provides presumptive evidence of alcohol influence, but does 	<p>Example:</p> <ul style="list-style-type: none"> o chemical test result 0.05; o arresting officer provides clear, descriptive testimony concerning defendant's impaired driving, stuporous appearance, slurred speech, difficulty in balancing, inability to perform field sobriety tests, etc. o result: guilty. <p>Solicit participant's questions concerning the nature and legal significance of "presumptive evidence."</p>
HS 178 R2/06	III-5	


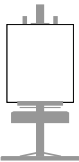
Aids	Lesson Plan	Instructor Notes
<div data-bbox="232 390 302 457"></div> <div data-bbox="191 478 337 510">5 Minutes</div> <div data-bbox="232 533 313 693"></div> <div data-bbox="204 856 367 940"></div> <div data-bbox="191 968 305 1035">Display III-7</div>	<p data-bbox="565 306 865 369">not provide conclusive evidence.</p> <p data-bbox="428 411 954 510">C. Illegal Per Se Statute: Driving with a Prohibited Blood Alcohol Concentration</p> <ol data-bbox="464 552 954 1839" style="list-style-type: none"> <li data-bbox="464 552 954 651">1. Illegal Per Se is another drinking-driving offense, related to, but different from DWI. <li data-bbox="464 831 954 1281">2. Elements of the Offense: it is unlawful for any person to... <ol data-bbox="516 936 954 1281" style="list-style-type: none"> <li data-bbox="516 936 954 999">a. operate or be in actual physical control of... <li data-bbox="516 1041 740 1073">b. any vehicle... <li data-bbox="516 1115 813 1146">c. within this state... <li data-bbox="516 1188 954 1281">d. while having a blood alcohol concentration at or above state's level. <li data-bbox="464 1323 954 1839">3. Illegal Per Se makes it an offense, in and of itself, to drive while having a BAC at or above state's level. <ol data-bbox="516 1503 954 1839" style="list-style-type: none"> <li data-bbox="516 1503 954 1671">a. To convict someone of an Illegal Per Se violation, it is <u>not</u> necessary to establish that the driver was under the influence. <li data-bbox="516 1713 954 1839">b. It is sufficient to establish that the driver's BAC was at or above state's level while operating a vehicle in this 	<p data-bbox="1000 552 1414 688">Instructor please note: If your state does not have an Illegal Per Se law, you may wish to skip this segment.</p> <p data-bbox="1000 726 1393 789">Write "Illegal Per Se" on dry-erase board or flipchart.</p> <p data-bbox="1000 1115 1409 1209">Compare and contrast these elements with the elements of DWI.</p> <p data-bbox="1000 1325 1422 1388">Point out that "Per Se" roughly translates as "in and of itself."</p>


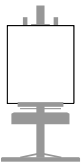
Aids	Lesson Plan	Instructor Notes
	<p>state.</p> <ol style="list-style-type: none"> 4. The Illegal Per Se law does not replace the DWI law: the two statutes work side-by-side. <ol style="list-style-type: none"> a. The two laws define two separate offenses. b. One law makes it an offense to drive while under the influence of alcohol and/or any drug. c. The other law makes it an offense to drive while having more than a certain percentage of alcohol in the blood. d. Since there is an Illegal Per Se law, why is it necessary to retain the old DWI law? 5. For the Illegal Per Se offense, the chemical test result is <u>conclusive</u> evidence. 6. Principal purpose of Illegal Per Se law is to facilitate <u>prosecution</u> of drinking-driving 	<p> Pose the question to the class. Probe for responses until at least the following points have emerged:</p> <ul style="list-style-type: none"> o some suspects refuse to submit to chemical testing; o some violators are under the influence of drugs other than alcohol; o some are under the influence of alcohol at BACs below state's level. <p>Contrast with the DWI offense.</p> <p>NOTE: Instructors must know their state law.</p>

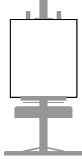
Aids	Lesson Plan	Instructor Notes
	<p>offenders.</p> <ul style="list-style-type: none"> a. The law reduces the state's burden of proof. b. Not necessary to show that defendant was "under the influence." c. Sufficient to show that defendant's BAC was at or above state's level. <p>7. However, Illegal Per Se law doesn't really make drinking-driving <u>enforcement</u> any easier.</p> <ul style="list-style-type: none"> a. Officer must still have probable cause to believe that the suspect is under the influence before the arrest can be made. b. Implied Consent law requires that suspect <u>already be arrested</u> before the suspect is deemed to have given consent to submit to the chemical test. c. Implied Consent law also requires that the arrest be made for "acts alleged to have been committed while operating a vehicle while under the influence..." <p>8. Summary point: police officers dealing with drinking-driving suspects must continue to rely primarily on their own powers of <u>detection</u> to determine whether or not an arrest should be made.</p>	<p>NOTE: Instructor should review your state's policy.</p> <p>i.e., not required to demonstrate that the defendant's ability to drive was affected.</p> <p>NOTE: Sufficient grounds for making the stop must be articulated.</p> <p>Remind participants that allegation is more than mere suspicion: requires probable cause to believe the offense has been committed.</p>

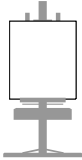

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<div data-bbox="233 1262 302 1331"></div> <div data-bbox="191 1352 337 1383">5 Minutes</div>	<div data-bbox="516 302 951 1247"> <ul style="list-style-type: none"> a. Usually, it is impossible to obtain a legally admissible chemical test result until <u>after</u> the suspect is arrested. b. In some cases, suspects will refuse the chemical test after being arrested; then, the case will depend strictly on the officer's observations and testimony. c. While making a DWI arrest, an officer should always assume that the suspect <u>will</u> refuse the chemical test. d. The officer should strive to organize and present all observations in the written report and in verbal testimony, in such a clear and convincing fashion that the violator will be convicted regardless of whether the test is taken and regardless of the test result. </div> <div data-bbox="428 1283 951 1388"> <p>D. Preliminary Breath Testing: Obtaining an indication of suspect's BAC prior to arrest</p> </div> <div data-bbox="464 1423 951 1808"> <ul style="list-style-type: none"> 1. Purpose of the law: The preliminary breath testing law permits a police officer to request a DWI suspect to submit to an on-the-spot breath test prior to arresting the suspect for DWI. 2. Application of the law: When an officer has reason to believe... </div>	<div data-bbox="1003 898 1435 1073"> <p>NOTE: Stress the importance of thorough documentation, i.e., "The DWI Investigative Field Notes" that will be explained in Session IV.</p> </div> <div data-bbox="1003 1283 1435 1423"> <p>Instructor please note: If your state does not have a preliminary breath testing law, skip this segment.</p> </div>

III-10

Aids	Lesson Plan	Instructor Notes
<div data-bbox="224 321 289 388"></div> <div data-bbox="191 411 357 441">30 Minutes</div> <div data-bbox="224 1041 302 1201"></div>	<div data-bbox="428 304 779 333">E. Case Law Review</div> <p data-bbox="461 375 919 548">The following cases are landmark court decisions relevant to the admissibility of the SFSTs including Horizontal Gaze Nystagmus.</p> <p data-bbox="461 585 883 648">Challenges to the admissibility have been based on:</p> <ol data-bbox="461 690 951 968" style="list-style-type: none"> 1. Scientific validity and reliability. 2. Relationship of HGN to specific BAC level. 3. Officer training, experience, and application. 	<p data-bbox="1002 304 1429 615">The National Traffic Law Center (NTLC) has a list of every state's Appellate Court/ Supreme Court case addressing HGN and SFST issues. The materials are available to law enforcement at www.ndaa.org/apri/NTLC or by phone (703) 549-4253.</p> <p data-bbox="1002 690 1208 720">See Blake case.</p> <p data-bbox="1002 795 1227 825">See Loomis case.</p> <p data-bbox="1002 900 1239 1001">See Murphy case. See Homan case. See Smith</p> <p data-bbox="1002 1041 1414 1278">NOTE: Prepare the following matrix on the dry-erase board or flipchart using Blake, Loomis, Murphy, Homan, and Smith. Refer to Attachment A to select case law applicable to your state.</p>
<div data-bbox="207 1348 302 1411"><u>CASE NAME</u></div> <div data-bbox="207 1419 289 1446">Blake</div> <div data-bbox="207 1455 305 1482">Loomis</div> <div data-bbox="207 1491 318 1518">Murphy</div> <div data-bbox="207 1526 305 1554">Homan</div> <div data-bbox="207 1562 289 1589">Smith</div>	<div data-bbox="391 1381 492 1411"><u>STATE</u></div> <div data-bbox="574 1381 659 1411"><u>YEAR</u></div> <div data-bbox="696 1348 967 1411"><u>APPELLATE/ SUPREME COURT</u></div> <div data-bbox="1002 1381 1195 1411"><u>ADMISSIBLE</u></div> <div data-bbox="1247 1348 1414 1411"><u>EVIDENCE OF BAC</u></div>	
<div data-bbox="191 1881 367 1911">HS 178 R2/06</div>	<ol data-bbox="461 1671 891 1839" style="list-style-type: none"> 4. State vs. Blake <ol data-bbox="516 1776 891 1839" style="list-style-type: none"> a. This is considered a landmark case on HGN, <div data-bbox="774 1881 846 1911">III-11</div>	<p data-bbox="1002 1671 1414 1734">Write "Arizona; 1986" opposite Blake on the matrix.</p> <p data-bbox="1002 1776 1385 1839">Place a large asterisk on the matrix next to Blake.</p>

Aids	Lesson Plan	Instructor Notes
	<p>because it was the first State Supreme Court-level ruling.</p> <p>b. The Arizona Supreme Court found that HGN satisfies the Frye standards for evidence to corroborate, or attack, the issue of a suspect's impairment.</p> <p>c. In effect, in the Blake case, the Arizona Supreme Court took judicial notice of HGN: Henceforth, in Arizona, it is not necessary to introduce expert scientific testimony to secure the admissibility of HGN.</p> <p>d. The court also set standards governing the training of officers who would be qualified to testify about HGN.</p> <p>e. The Court also explicitly found that HGN cannot be used to establish BAC quantitatively in the absence of a chemical test.</p>	<p>Write "Frye Standards" on the dry-erase board or flipchart. Clarification: The Frye case (decided by the U.S. Supreme Court) set the standards governing the admissibility of "new" scientific evidence.</p> <p>Under "Admissibility" opposite Blake, write "Absolutely YES".</p> <p>Under "Evid of BAC" opposite Blake, write "Absolutely NO".</p>
	<p>5. People vs. Loomis</p> <p>a. Court held that the officer was not entitled to testify as either a lay or expert witness about HGN, or to give his opinion about the defendant's BAC.</p>	<p>Write "California; 1984" opposite Loomis on the matrix.</p> <p>Point out that the arresting officer attempted to use the onset angle to give a quantitative estimate of BAC. The court would not accept it.</p> <p>Under "Evid of BAC" opposite Loomis, write NO.</p>

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	<ul style="list-style-type: none"> b. The court noted the statement in the NHTSA Participant Manual which states “if any of the SFST elements is changed, the validity of the tests is compromised.” c. This decision was based upon an older edition of this manual and was a strict interpretation by the court. The phrase in question only applied to the use of SFSTs for training purposes. <p>8. Smith vs. Wyoming</p> <ul style="list-style-type: none"> a. For the purpose of establishing probable cause, an officer may testify to the results of field sobriety tests (including HGN) if it is shown that the officer has been adequately trained and conducted them in substantial accordance with that training. b. Deficiencies in the administration of the SFSTs go to the weight accorded the evidence and not to its admissibility. <p>9. Summary of HGN Case Law.</p>	<p>Note: “FOR TRAINING PURPOSES, THE SFSTs ARE NOT AT ALL FLEXIBLE. THEY MUST BE ADMINISTERED EACH TIME, EXACTLY AS OUTLINED IN THE COURSE.”</p> <p>Regarding Homan and State vs. Schmitt, 101 Ohio St 3d 19, 2004.</p> <p>Also: See SFST Instructor’s Manual, Session VII, page 4, Instructor’s Notes column.</p> <p>See the Administrator’s Guide, page 8, number 8.</p> <p>Note: The Homan decision does not preclude officers from testifying to observations even if SFSTs are barred. See <i>Ohio v. Schmitt</i>, 101 Ohio St.3d 79, 2004.</p> <p>Write “Wyoming; 2000” opposite Smith on the matrix.</p> <p>Under “Supreme/Appellate Court” write “SUPREME”.</p> <p>Under “Admissibility” opposite Smith write “YES”.</p> <p>Under “Evidence of BAC” opposite Smith write “N/A”.</p> <p>Solicit participants' questions and comments about case law.</p>

Aids	Lesson Plan	Instructor Notes
 	<ul style="list-style-type: none"> a. The prevailing trend, in recent years, is for courts to admit HGN as evidence of impairment, provided the proper scientific foundation has been laid. b. But courts consistently reject all attempts to introduce HGN as evidence of a quantitative BAC. <p>10. Case Law of Relative Importance.</p> <ul style="list-style-type: none"> a. State vs. Ricke <ul style="list-style-type: none"> (1) The court held that HGN test results could be admitted into evidence to corroborate chemical test evidence that a person was operating a motor vehicle with a BAC level at or above 0.10. (2) The court also held that HGN results could be admitted as independent proof for the offense of DWI. b. State vs. City Court of City of Mesa <ul style="list-style-type: none"> (1) The court ruled that in cases where there is no chemical test to determine a BAC level, HGN test results can be admitted the same as of field sobriety tests to show a neurological dysfunction, one cause of which could be the ingestion of alcohol. 	<p>NOTE: For further information, contact: American Prosecutors Research Institute's National Traffic Law Center, 99 Canal Center Plaza, Suite 510, Alexandria, Virginia, 22314, (703) 549-4253 to obtain a copy of Frye v. Federal Rules, May 1994 (an in-depth discussion of Frye).</p> <p>Write each case on dry-erase board or flipchart.</p> <p>Write "AZ; 1989" on dry-erase board or flipchart.</p> <p>Write "In An Illegal Per Se Case" on dry-erase board or flipchart.</p> <p>Cannot be used as evidence of specific BAC level.</p> <p>Write "AZ; 1990" on dry-erase board or flipchart.</p> <p>Write "No Chemical Test - HGN Admissible".</p> <p>Write on dry-erase board or flipchart - "Cannot be used as evidence of specific BAC level".</p> <p>NOTE: Use Attachment B for any relevant discussion.</p>

TEST YOUR KNOWLEDGE

INSTRUCTIONS: Complete the following sentences.

1. The elements of the Basic DWI Law are:
 - a.
 - b.
 - c.
 - d.
2. If DWI is a criminal offense, the standard of proof is _____

3. The purpose of the Implied Consent Law is _____

4. Under the Implied Consent Law, chemical test evidence is _____
_____ evidence.
5. The Illegal Per Se Law makes it unlawful to _____

6. The PBT law permits a police officer to request a driver suspected of DWI to ____

7. PBT results are used to help determine _____
